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No. 88-1466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PEOPLE OF ENEWETAK, RONGELAP, AND OTHER MARSHALL ISLANDS ATOLLS,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. Then a member of the United States House of Representatives, the undersigned, John F. Seiberling, served as chairman of the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, the committee with primary responsibility in the House for the Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986) (the "Compact Act"), the statute whose interpretation is a central issue in this litigation. In the 98th and 99th Congresses, Rep. Seiberling's subcommittee held 14 hearings on the Compact Act. In addition, he was House floor manager and a principal co-sponsor of that legislation. This brief is submitted by Mr. Seiberling in his own behalf and by

James E. Davis, a member of the bar of this Court, in behalf of Mr. Seiberling.

2. The extent of the obligations of the United States government to residents of the Marshall Islands who may have been injured by the U.S. nuclear tests there during the period of U.S. trusteeship, and the question of whether these people still have justiciable claims for additional compensation which are protected by the U.S. Constitution, comprise issues of great moral as well as legal significance for the United States. These issues led Congress to take a very careful and cautious approach to the claims settlement provisions of the Compact.

3. In considering the petition for a writ of certiorari, the Court should be aware that the Respondent's construction of the Compact Act and the construction adopted by the courts below include material misinterpretations of the Act and of the Congressional intent. Specifically, Congress did not intend that the withdrawal of jurisdiction from U.S. courts to hear petitioners' claims would be effective whether or not the purported espousal of those claims by the new Government of the Marshall Islands were found to be invalid. Serious questions had been raised in both houses of Congress as to whether claims such as those of the petitioners had been validly espoused and whether the withdrawal of U.S. court jurisdiction was constitutional. For that reason, Congress made the jurisdictional provisions of Article XII of the Section 177 Agreement (which was approved by Congress subject to the limitations of the Compact Act) conditional upon the efficacy of the espousal in Article X of that Agreement. Specifically, Congress provided in Section 103(g)(2) of the Compact Act that:

> the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement ["Espousal"] and only as a clarification of the effect of Article X, and are not to be construed or implemented separately from Article X.

4. The evident meaning of this text is confirmed by Rep. Seiberling's statements in the *Congressional Record*. For example, in his analysis of the final version of the bill, Rep. Seiberling explained to the House that Section 103(g)(2) was:

> intended to make it clear that *court-stripping provisions of article XII of the section 177 agreement have no independent force or effect and their sole function is to implement the provisions of article X*. Thus, if article X is valid, espousal stands; and if article X is invalid, claims covered by the espousal provisions will remain justiciable in U.S. courts, regardless of article XII.

131 Cong. Rec. H11829 (Dec. 11, 1985) (emphasis added).

5. Further, in the course of House debate on the final version of the Compact Act, Rep. John Bryant expressed a concern:

> that the executive and legislative branches are attempting here to extinguish rights which are constitutional in scope and can be resolved only by the judicial branch. 131 Cong. Rec. H11838 (Dec. 11, 1985).

In response to Rep. Bryant, Rep. Seiberling, speaking as manager of the bill stated:

> the provisions of the compact regarding espousal of the Marshall Islands' claims are subject to judicial review like any act of Congress. *Id.*
>
> . . . a legacy of the unique relationship of the United States to the Marshall Islanders under the U.N. trusteeship agreement will be the pending constitutional questions with respect to their rights, questions which cannot be foreclosed from court review. *Id.*

After Representative Seiberling's statement, which was unchallenged and uncontradicted, the House proceeded to

approve the Compact Act by unanimous voice vote. *Id.* The Senate approved the Act two days later. 131 Cong. Rec. S17653 (Dec. 13, 1985).*

6. The petition for a writ of certiorari should be granted because (i) the court below incorrectly failed to give effect to Section 103(g)(2) of the Compact Act by implementing the jurisdiction-stripping provision without first determining the validity of the espousal; and (ii) the treatment of the claims of native Marshallese people by the United States Government in accordance with the U.S. Constitution, U.S. treaty obligations, and international law is an issue of the highest significance that warrants judicial consideration on the merits.

Respectfully submitted,

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* Copies of the Congressional Record pages containing the debate from which the above excerpts were taken are attached hereto (Pages H11828, H11829, H11837, H11838).

APPENDIX

APPENDIX

EXCERPTS FROM CONGRESSIONAL RECORD

Dated December 11, 1985

(Pages H11828, H11829, H11837, H11838)

* * * *

Mr. SEIBERLING. Mr. Speaker, I yield myself such time as I may consume.

* * * *

SECTION 177 AGREEMENT

Section 103(e)(5) requires an annual report to be transmitted by the Marshalls government to the Congress regarding all actions of the fund manager in connection with the section 177 agreement. It should be noted here that the Congress fully expects such annual report to include the entire fund manager's report, not simply excerpts from it.

ESPOUSAL

The House bill included language explicitly providing for tolling of the statute of limitations for the period between the effective date of the compact and any subsequent determination by a U.S. court that the espousal provisions, that is, article X of the section 177 subsidiary agreement are invalid as a matter of international law or for any other reason. The revised version omits this, since it is generally agreed that existing laws and judicial procedures ensure that tolling of the statute of limitations would occur under such circumstances. The House bill also included language specifying that should article X of the section 177 subsidiary agreement be held invalid, article XII of that agreement would have no effect; while this language has been somewhat revised, the new version is to the same effect. The new language is intended to make it clear that court-stripping provisions

of article XII of the section 177 agreement have no independent force or effect and their sole function is to implement the provisions of article X. Thus, if article X is valid, espousal stands; and if article X is invalid, claims covered by the espousal provisions will remain justiciable in U.S. courts, regardless of article XII.

* * * *

Mr. SEIBERLING. Mr. Speaker, I yield the balance of my time to the gentleman from Texas [Mr. BRYANT].

The SPEAKER pro tempore. The gentleman has 2 minutes remaining.

The gentleman from Texas [Mr. BRYANT] is recognized for 2 minutes.

(Mr. BRYANT asked and was given permission to revise and extend his remarks.)

Mr. BRYANT. I thank the gentleman for yielding time in order that I might engage him in a colloquy on section 177 of the compact and the subsidiary agreement, which states that the newly constituted government of Micronesia will epouse the claims currently pending in Federal court against the United States by Marshall Islanders whose land was contaminated by atomic testing. So far the claims total $5 billion. The compact purports to turn all responsibility for them over to the Government of Micronesia, and provides what is essentially a block grant of $150 million to take care of them.

There are important constitutional questions at stake regarding these claims and their espousal. I inserted a brief by legal scholars at the Congressional Research Service discussing these constitutional questions into the July 25 CONGRESSIONAL RECORD at pages H6345-H6346.

If the claims of the Marshall Islanders prove meritorious, then the block grant will be totally inadequate to pay them. Micronesia is in no position to cover the shortfall, and the United States is attempting in this agreement to wash its hands of any further responsibility.

I am concerned about the effect of this agreement on the rights of the Marshall Islanders whose property has been contaminated for generations to come. I am concerned that the executive and legislative branches are attempting here to extinguish rights which are constitutional in scope and can be resolved only by the judicial branch. And I am concerned that by approving the compact in this form, we may by our vote somehow invoke the political question doctrine, and cause the reviewing court to defer to the compact rather than resolve the constitutional questions independently.

I believe that is not the intent of the author, and I wish the author would speak to these concerns in this regard.

Mr. SEIBERLING. Mr. Speaker, if the gentleman will yield, the provisions of the compact regarding espousal of the Marshall Islands' claims are subject to judicial review like any act of Congress.

Once we in Congress have acted, the United States and the Marshall Islands will be terminating their U.N. trusteeship relationship and entering into a new relationship of free association. Part of the new relationship will involve foreign policy issues which under the Constitution are within the primary purview of the executive branch, and thus to some extent beyond the detailed scrutiny of the courts. But a legacy of the unique relationship of the United States to the Marshall Islanders under the U.N. trusteeship agreement will be the pending constitutional questions with respect to their rights, questions which cannot be foreclosed from court review.

Our action today in approving the compact should not alter a court's view of whether any question regarding rights of the Marshall Islanders which have already vested is a political question.

* * * *